Supreme Court, U.S.
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No. 00-553

IN THE

Supreme Court of the United States

MOHAMMAD M. SHINWARI,

Petitioner,

v.

RAYTHEON AIRCRAFT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Raytheon Aircraft Company is a wholly-owned subsidiary of Raytheon Aircraft Holdings, Inc. Raytheon Aircraft Holdings, Inc. is wholly-owned by Raytheon Company of Lexington, Massachusetts, which is a publicly traded company.

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the Tenth Circuit Court of Appeals, which affirmed the district court's summary judgment in favor of Respondent, failed to follow the law as stated by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). The ruling by the Tenth Circuit is not in conflict with the *Reeves* decision, and the Petition should be denied.

I.

THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THIS CASE

A. Petitioner Has Misstated the Facts of the Case

Petitioner has misstated the facts of this case. In an attempt to attract this Court's attention, Petitioner claims that the Tenth Circuit's decision is contrary to this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). For the reasons discussed hereafter, this argument is without merit.

Petitioner's first material misstatement of fact concerns the timing of the two decisions by the Tenth Circuit, and how they correspond chronologically to this Court's decision in *Reeves*. Petitioner correctly states that the Tenth Circuit issued its decision affirming the district court on June 8, 2000. Petitioner correctly states that the Tenth Circuit issued its order denying rehearing or en banc review on July 11, 2000. However, Petitioner then claims that this Court's decision in *Reeves* was issued four days after the Tenth Circuit's final opinion. Pet. at 4. That statement is not correct, and could

mislead this Court to the conclusion that the appellate court did not have an opportunity to consider its decisions in light of *Reeves*. In fact, the *Reeves* decision was issued on June 12, 2000, four days after the initial decision by the Tenth Circuit. Petitioner thus had the opportunity, and indeed did raise the *Reeves* decision in his petition for rehearing or en banc review. The Tenth Circuit took the *Reeves* decision into account in making its determination to deny Petitioner's request for rehearing or en banc review.

There are other material misstatements of fact by Petitioner.[1] Respondent submits the following factual statement.

Respondent is a manufacturer of aircraft for general aviation and military use. In October of 1993, Petitioner sought employment with Respondent as an aircraft engineer. Petitioner is a Caucasian male of Pakistani national origin. Petitioner's resume and application indicated that Petitioner had obtained all education through a bachelor's degree in Pakistan. Petitioner's resume indicated that Petitioner had obtained a bachelor's degree in 1966, and that he had worked in the United States since 1973. Petitioner acknowledges that both his approximate age and nation of origin were patently obvious from the submitted information. Despite knowing that Petitioner was from Pakistan, and being able to ascertain his approximate age, Rick Gaines, a supervisory engineer

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1. As the district court noted in determining whether summary judgment should be granted, Petitioner repeatedly failed to support his contentions with any reference to evidence in the record. Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 56.1 of the Rules of Practice of the United States District Court for the District of Kansas, the Court properly deemed Respondent's statements of fact to be admitted. Pet., App. C at 56a, n.10; 57a, n.11 & 13; 59a, n.14. Petitioner, having failed to comply with the federal and local rules regarding summary judgment motions, now seeks to relitigate the facts of the case in this Court.

for Respondent, recommended that Petitioner be hired. Petitioner's date of birth is May 10, 1947, and he was hired by Respondent when he was age forty-seven. Less than three years later, he was terminated for poor performance and his unwillingness to accept criticism or direction from his supervisors. Petitioner's age at the time of the termination of his employment was forty-nine.

Petitioner was initially assigned to work on the King Air, an aircraft that Respondent has been manufacturing since 1964. Petitioner's immediate supervisor was Rick Gaines. Because the King Air had already been in production for more than thirty years, Petitioner's assigned tasks did not require him to design any element of the aircraft.

At the time he supervised Petitioner, and throughout the remainder of Gaines' employment by Respondent, Gaines was a Designated Engineering Representative (DER), a qualification which allows him to certify that engineering work is in compliance with regulations promulgated by the Federal Aviation Administration (FAA), the federal agency which oversees the design and manufacture of aircraft.

Petitioner testified that Rick Gaines did nothing discriminatory to him while he was assigned to the King Air program. Likewise, Petitioner is not aware that Rick Gaines ever said or did anything offensive or discriminatory to any other employee.

Petitioner's statement of facts incorrectly suggests that his supervisors' dissatisfaction with his attitude and performance only began after he alleged discriminatory treatment. Pet. at 5. As the district court correctly noted, that was not the case. Pet., App. C at 55a-57a. From the early part of his employment with Respondent, Petitioner exhibited an unwillingness to accept the directives of his supervisors.

For example, Petitioner was asked to develop a kit for the 1900 aircraft, and he selected certain fittings that were not commonly used by Respondent. Rick Gaines, Petitioner's supervisor, told Petitioner to use a more common fitting, in order to minimize costs. Petitioner then resubmitted the drawing, using the same fitting as he had previously selected. Gaines again told Petitioner to use more commonly-used fittings, and suggested one that would be appropriate. Gaines was reassigned to another group prior to the release of Petitioner's drawing, but later learned that Petitioner had not changed the drawing call-out. The kit had to be revised and corrected by someone else.

In early 1995, the company had established the PD-376 program. This program was involved with preliminary design work for what eventually became the Hawker Horizon aircraft program. Initially, Sam Bruner was the only employee working on the program. Later, other employees were gradually added to the program. Eddy Arnold was one of Sam Bruner's direct reports, and was managing the air vehicle design group, which was responsible for designing the physical hardware on the aircraft. Eddy Arnold, who has worked for Respondent for twenty-nine years, was born on March 31, 1938. Currently, he is sixty-two years old. Arnold was born in Canada, and is a naturalized citizen of the United States.

In October of 1995, Petitioner was included in a group of engineers who were going to be terminated because they were no longer needed on the King Air program. Eddy Arnold reviewed the list, and chose four persons to interview, including Petitioner. The interview was successful, and Petitioner was transferred to the PD-376 program effective November 1, 1995.

In mid-1996, Respondent determined that the Hawker Horizon program should proceed to the next step beyond preliminary design. More people were hired and transferred to the program. In June of 1996, Rick Gaines was transferred to the program, and was told that he would be the group engineer for the environmental systems and ice protection group. Gaines, who had previously supervised Petitioner, was told that Petitioner would be working for him again. By September 25, 1996, Gaines was reporting to Eddy Arnold that he found Petitioner extremely difficult to deal with, due to his "arrogant incompetence."

Art Kavie was transferred to the program as the manager of the design build team (DBT) for the Hawker Horizon in October of 1996. Gaines then reported to Kavie. Petitioner reported first to Gaines and then to Kavie.

In the summer of 1996, Petitioner was directed to perform certain calculations concerning the ice protection system for the Hawker Horizon aircraft. Adequate ice protection is critical to the safe operation of the aircraft. Petitioner presented his calculations to a group of design engineers, including Derek Rounds. Rounds is a specialist in ice protection systems, and came from England with the Hawker aircraft. Rounds and Rick Gaines found significant errors in Petitioner's work. Had Respondent used Petitioner's calculations for the ice protection system, it could have chosen the wrong engine for the aircraft because Petitioner's calculations would have evaluated an engine as being adequate when it actually lacked the capacity to produce the amount of warm bleed air necessary to operate the anti-icing system. Petitioner's conclusions were based on mathematical errors and erroneous assumptions. Although the information Petitioner needed to formulate accurate assumptions regarding the aircraft's flight envelope was readily available to him, Petitioner's calculations were premised on points

that were not even within the aircraft's flight envelope. Despite Rounds' experience and expertise, Petitioner denied that he had made any errors, and ignored Rounds' criticisms. Petitioner still contends that there were no errors in his work on the anti-icing system.

In mid-1996, Art Kavie attended a meeting where Petitioner presented information regarding anti-icing air. Petitioner calculated the requirements in terms of air temperature. Kavie disagreed, and suggested that the proper calculation was in terms of BTU's, since that is a measure of heat delivered by the system, rather than air temperature. Petitioner became offended, raised his voice inappropriately, and became accusatory and argumentative with Kavie.

In September 1996, Eddy Arnold was directed to prepare the annual performance review for Petitioner. Arnold noted that Petitioner needed to learn to handle constructive criticism in a manner that could lead to improved performance. In Arnold's judgment, Petitioner became defensive and stubborn if anyone criticized his work. Arnold prepared a draft of the review, which he and Sam Bruner discussed. Sam Bruner suggested that Petitioner also needed to exercise more care in reducing errors in analysis calculations, and Arnold incorporated that suggestion into the evaluation.

Petitioner was given his performance review on September 4, 1996. Petitioner was rated as Fully Competent. Petitioner responded that "[a]ssigned ratings (not including ratings for 'safety and security' and 'business and ethics and conduct') are *not* commensurate with my performance. These ratings should have been in the 'outstanding' to 'excellent' range."

Petitioner called Nita Long on or about September 21, 1996, and complained that he was dissatisfied with his

performance evaluation. Petitioner did not allege any discrimination. They arranged to meet on October 23, 1996. During that meeting, Petitioner reiterated that he was dissatisfied with his review. Petitioner did not suggest that he was being discriminated against. Long offered to arrange a meeting with Petitioner and his supervisors.

In the fall of 1996, Art Kavie officially named Rick Gaines as the DBT lead. When Petitioner learned of this, he told Kavie, in an accusatory tone, that Kavie should have notified Petitioner about the decision sooner. Kavie told Petitioner that he made the announcement when he was prepared to do so.

On October 16, 1996, Petitioner sent a memorandum to Malcolm Bowd and others, describing how a portion of the anti-icing system should be configured. The usual procedure was that group members did not send out memoranda until there was a consensus within the group as to the material contained therein. Therefore, Petitioner's memorandum suggested an agreement that had, in fact, not been reached by the environmental systems control group. Petitioner had previously been told by Gaines that the ideas contained within the memorandum were *not* going to be used. Despite this very specific instruction, Petitioner persisted in presenting his ideas to other groups. Petitioner did not send a copy of the memorandum to Rick Gaines, his immediate supervisor, or to Art Kavie, his next-level supervisor.

The features suggested by Petitioner in the October 16, 1996 memorandum were, in many respects, directly contrary to Gaines' instructions to Petitioner concerning the design of the systems. For example, Petitioner suggested a high pressure side condensing/water separating method that was outside the weight and cost parameters for the aircraft. Petitioner and Gaines had discussed this issue on several prior

occasions, and Gaines had described why Petitioner's ideas were not feasible. Petitioner persisted, repeatedly bringing his design back to Gaines. He was told each time that his design could not be used. Gaines had told Petitioner repeatedly that no information concerning water separators was going to be sent to another group until there was a basis for making such a recommendation. Despite that instruction, Petitioner issued his memorandum of October 16, 1996. Malcolm Bowd, a recipient of the memorandum, responded that he had serious misgivings about the features identified in Petitioner's memorandum.

On October 24, 1996, Petitioner sent out a draft of the Air Conditioning Specification for comments, without first discussing it with Gaines. Gaines had repeatedly asked Petitioner to route all specifications through Gaines prior to sending them out. When Gaines made such requests, Petitioner was argumentative. Gaines testified that Petitioner deliberately tried to be intimidating in such circumstances, literally looking down his nose at Gaines. The Air Conditioning Specification sent out by Petitioner was not compatible with the aircraft design.

As Nita Long was arranging a meeting between Petitioner, his supervisors, and herself, the Human Resources representative on the Hawker Horizon program reported that Petitioner's supervisors wanted to meet with Long due to Petitioner's performance problems. Long arranged to have both meetings on November 15, 1996.

The first meeting on November 15, 1996 was attended by Petitioner, Eddy Arnold, Nita Long and Sam Bruner. In that meeting, Petitioner spent approximately an hour discussing the September 1996 review, and the items with which he took exception. Arnold explained why he marked each category as he had, and described what Petitioner could do to improve his performance. Petitioner appeared not to want to hear what Eddy Arnold had to say about his performance. The evaluation was not changed.

After the first November 15, 1996 meeting concluded, Eddy Arnold left and Rick Gaines and Art Kavie joined the meeting. Petitioner was given a special review that rated his performance as unsatisfactory in the categories of Quality of Work, Quantity/Timeliness of Work, Attitude/Effective Relationships, and Leadership Effectiveness. Petitioner was rated as needing development in the category of Initiative, and received an overall rating of unsatisfactory. Petitioner was also given a memorandum which discussed Petitioner's performance problems.

Petitioner now contends that he mentioned discrimination in the November 15, 1996 meeting. That assertion is belied by his own documentation. Petitioner's notes from that meeting make no mention of any discrimination allegation. Pet., App. C at 72a. His November 27 note to Nita Long states that he had *not* previously raised such allegations.

Even more important is the fact that there had been a number of issues concerning Petitioner's performance and attitude, and these problems had arisen many months prior to the first alleged allegation of discrimination. Even if Petitioner had claimed discriminatory treatment on November 15, 1996, that allegation would have come well after Petitioner's supervisors began to be very critical of his performance, attitude, and willingness to take direction. Since all of these problems preceded even the earliest of the occasions on which Petitioner claims to have engaged in protected activity, the complaints could not logically have been in retaliation for the alleged protected activity, which had not yet occurred.

On November 21, 1996, Rick Gaines gave Petitioner two written assignments. The first assignment called for preparation of a combined environmental control systems

(ECS) and pressurization specification and statement of work. The second directed Petitioner to prepare an oxygen system specification.

After the November 15 meeting, Petitioner acted resentful toward Rick Gaines when Gaines attempted to give him instructions. Petitioner acted defensive, "put upon," withdrawn, curt, and hostile. When they discussed assignments, Petitioner was curt and refused to make eye contact with Gaines. After receiving the assignments from Gaines on November 21, 1996, Petitioner muttered, "Well, if you had only told me what you wanted." Gaines believed this comment was indicative of Petitioner's continued disagreement with Gaines' attempts to supervise him. Art Kavie testified that, after the November 15 meeting, Petitioner would not speak to Kavie when they passed in the hall and Kavie extended a greeting to Petitioner. According to Kavie, he and Petitioner saw each other at least once a day, and frequently crossed paths as often as two or three times daily. In the ten years Kavie has worked for Raytheon, he had never been treated that rudely by anyone else.

On November 27, 1996, just before the Thanksgiving holiday, Petitioner submitted a written response to the memorandum he was given on November 15, 1996. Petitioner had retained counsel prior to submitting this response.

The November 27, 1996 response is remarkable in several aspects. First, Nita Long's copy of it was accompanied by a note from Petitioner in which he made suggestions that he was being subjected to age or national origin discrimination. Petitioner stated to Nita Long:

> When I met with you about my performance review in October, **I did not raise any allegations**

> **about discrimination based on my age or national origin** because I did not want to belive [sic] that either of those factors might have motivated my management to treat me unfairly. Now after having had my technical competence and performance questioned by Mr. Gaines, I certainly believe that there is something more that is motivating him to treat me in this adverse manner. It appears to me that there has been an effort to eliminate older workers (of which I am one) from lead positions and to weed older workers out. **I do not have any proof.** I would like to have your office investigate the recent changes to my situation and to others in my department.

(Emphasis added). Pet., App. C at 61a-62a. Petitioner did not send the attachment to any of his supervisors. Likewise, Nita Long did not show anyone else the note or inform anyone else about Petitioner's suggestion that he was being discriminated against.

Petitioner contends that Sam Bruner was actually aware of Petitioner's note to Nita Long of November 27, 1996. In his deposition, Bruner was confused by the question, and responded that he had seen the attachment prior to Petitioner's termination. However, Sam Bruner's deposition corrections noted and corrected his misstatement. Moreover, as the Tenth Circuit noted, Bruner was not the person who made the decision to terminate Petitioner. Art Kavie made that decision. Furthermore, as the Court of Appeals noted, the single inconsistency in Bruner's deposition testimony "does nothing to undermine the allegations of deficient performance by Shinwari's other supervisors." Pet., App. A. at 24a. The Court of Appeals went on to note, "we conclude that the evidence of Shinwari's deficient performance is so

overwhelming and unrefuted that the single inconsistency in Bruner's deposition testimony cannot suffice to carry Shinwari's burden of showing pretext at the summary judgment stage." Pet., App. A at 25a.

Gaines thought the two assignments given to Petitioner on November 21, 1996 were of such magnitude that they would take Petitioner much longer to accomplish, but on December 4, 1996, Petitioner turned in his response. The work provided by Petitioner was handwritten, virtually illegible, filled with interlineations and scribbled out words, and appeared to have been very hurriedly done. The document would have to have been entirely rewritten in order to be acceptable. Gaines gave Petitioner's work to Art Kavie, who said he would just redo the work himself. Kavie and Gaines could not identify other assignments for Petitioner that they thought he would perform satisfactorily.

In mid-January, 1997, Petitioner's supervisors informed Nita Long that there were continuing performance and attitude problems with Petitioner. On or about January 15, 1997, Nita Long contacted Jim Miller in Engineering Administration. She asked Miller to try to find another engineering position for Petitioner. Miller later reported back to Long that he was unable to find another position for Petitioner. Miller told Long that supervisors who had worked with Petitioner before did not want him back, and that his reputation for being argumentative, opinionated, and unwilling to listen to others made other supervisors unwilling to accept him.

Since there was no other position available for Petitioner, Respondent decided to terminate his employment. On or about January 17, 1997, Art Kavie made the decision that Petitioner's employment should be terminated. Petitioner was informed that he could either resign or be involuntarily terminated. Petitioner chose to be involuntarily terminated.

Petitioner repeatedly contends that he is one of the best engineers anywhere. Petitioner claims that his work is the best, compared to any other engineer in the entire country. As the Court of Appeals noted, this contention is wholly unsupported by any independent evidence. Petitioner did not supply any testimonial or other evidence to indicate that anyone else shares his opinion. Pet., App. A at 22a-23a.

Petitioner admits that he never heard Rick Gaines make any age-based comment, nor was any such remark attributed to Rick Gaines by anyone else. Likewise, Petitioner admits that Art Kavie and Sam Bruner made no age-based remarks to him or anyone else.

Petitioner claims that he believed that other employees over age forty had been demoted and had leadership responsibilities reduced. Pet. at 4. Petitioner's administrative complaint identified Ted Seely as the purported victim of age discrimination. Seely was born on August 1, 1938, and was hired by Respondent on May 8, 1995, when he was almost fifty-seven years old. Petitioner contends that Ted Seely was discriminated against because he was replaced by Art Kavie. Art Kavie's date of birth is November 5, 1937, which makes Kavie older than Seely by about a year. It is obviously illogical for Petitioner to contend that he inferred age discrimination from the fact that the older of those two engineers was given the higher grade and greater responsibility.

Petitioner also contends that a younger employee was promoted to a lead position above Petitioner. The employee in question is Rick Gaines. Pet., App. C at 71a. Gaines had more than twenty years of experience with the company, had prior supervisory experience, and most importantly in the context of developing a new aircraft, possessed the Designated Engineering Representative (DER) credentials that would permit him to give the FAA's imprimatur to the

design plans for the Hawker. Pet., App. C at 51a, 76a. Petitioner did not have DER credentials, had no prior supervisory experience with the company, and indeed had previously been selected to be terminated from the King Air program in 1995. Gaines was determined to be the best qualified for the position. Pet., App. C, at 76a.

Petitioner claims that his belief that he was the victim of age discrimination was premised, in part, on the fact that he was, on one occasion, not permitted to give a presentation to upper management. Pet. at 4. Petitioner claimed that Eddy Arnold said that he was giving an opportunity to the younger leads. Pet., App. C, at 74a. As the district court noted, however, the person who actually gave the presentation that Petitioner desired to give was Malcolm Bowd. Bowd is two years older than Petitioner, and also foreign-born. Pet., App., C at 74a.

Petitioner also complains that Eddy Arnold mentioned, on an unspecified number of occasions, that Petitioner was from Pakistan and was not native-born. Petitioner does not contend that Arnold made the reference in any kind of negative or disparaging manner. Eddy Arnold is also foreign-born.

B. The Tenth Circuit's Ruling Does Not Conflict With *Reeves v. Sanderson Plumbing Products*

1. The Facts in This Case Are Markedly Different From Those in *Reeves*

In *Reeves*, the Petitioner had worked for Sanderson Plumbing Products for forty years, eventually achieving a supervisory position. Reeves had been just seventeen years old when he commenced his employment with Sanderson, and was age fifty-seven at the time of his termination.

Reeves was terminated by Powe Chesnut, the husband of the owner of the Sanderson company. Chesnut, who wielded "absolute power" within the company, had been heard making age-based comments to Reeves, including that he "was so old, he must have come over on the Mayflower," and that he was "too damned old to do his job." Chesnut had singled Reeves out for hostile and demeaning treatment.

Sanderson Plumbing contended that Reeves was fired for "shoddy record keeping." In response, Reeves offered "a substantial showing that respondent's explanation was false." 120 S. Ct. at 2107. Reeves offered specific evidence that he had maintained accurate attendance records, and that he was not assigned responsibility for dispensing discipline to employees who were tardy or absent. The company complained particularly about one instance in which an employee had been paid, despite the fact that she was absent from work. Reeves was able to conclusively prove that the payroll error was not his fault, since he had been hospitalized on the day the absence occurred. The Court held that the evidence offered by Reeves was sufficient to find that the employer's asserted justification for the termination was false, permitting the jury to reach the conclusion that the employer had engaged in unlawful discrimination. 120 S. Ct. at 2109.

In this case, the facts are dramatically different. In *Reeves*, the employee was able to provide proof that the "shoddy record keeping" that allegedly led to his termination was, for various reasons, not true. 120 S. Ct. at 1207. Petitioner in this case has provided absolutely no proof that the performance and attitude problems identified by Respondent as reasons for the termination were not true. As the Court of Appeals noted:

> Shinwari has produced no evidence that Raytheon's explanation of the underlying

> cause of the abrupt drop in performance evaluation lacks credibility. . . [R]eview of the records reveals that the only dispute arises from Shinwari's subjective evaluations of his own performance. While Shinwari's deposition is replete with broad contentions such as one that anyone in the aircraft industry would confirm that he is one of the finest engineers in that industry, such confirmation is conspicuously absent from the record — as is any affidavit or deposition testimony by anyone other than Shinwari himself confirming that his calculations were correct or his behavior acceptable.

Pet., App. A at 22a-23a.

Reeves was also able to produce evidence that Powe Chesnut, who made the termination decision, had a history of making derogatory age-based remarks and was motivated by an age-based animus. 120 S. Ct. at 2110-11. In this case, Rick Gaines, the same supervisory engineer who was responsible for hiring Petitioner, was the person who eventually came to criticize Petitioner's attitude and performance. Petitioner acknowledges that he was never aware of any discriminatory remarks or treatment by Gaines concerning Petitioner or any other employee's age or national origin. The decision to terminate Petitioner was made by Art Kavie. Kavie is nine years older than Petitioner, and Petitioner acknowledges that he was never aware of any age-based remarks or behavior on the part of Kavie. Likewise, Petitioner does not accuse Kavie of discriminatory comments or treatment on the basis of any employee's national origin.

2. The Tenth Circuit Court of Appeals Applied the Correct Standard of Proof

Petitioner contends that the Court of Appeals applied an incorrect burden of proof in this case. Pet. at 10. Specifically, Petitioner contends that the Tenth Circuit applied the very same standard that was rejected by this Court in *Reeves*. *Id.* Petitioner's contention is erroneous, and should not be credited by the Court.

Petitioner contends that the Court of Appeals erred because, in the final assessment, it disregarded the fact that Petitioner was found to have proved a *prima facie* case. Pet. at 10. In fact, the Court of Appeals' decision fully complies with the standards set forth in *Reeves*[2].

In *Reeves*, the Fifth Circuit Court of Appeals held that Reeves had proved the *prima facie* elements of an age discrimination claim. The Fifth Circuit then examined Sanderson's justification for its actions, and concluded that "a reasonable jury could have found that [Sanderson's] explanation for its employment decision was pretextual." *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688, 693 (5th Cir. 1999). However, the Fifth Circuit went even further, holding that, in order for the jury verdict in favor of Reeves to stand, he had to prove additional and new evidence that his age motivated Sanderson's decision. As this Court stated, "[T]he Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." 120 S. Ct. at 2108.

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2. Research does not reveal that this Court has specifically held that the *McDonnell Douglas* framework for assessing the burden and allocation of proof applies in retaliation cases. For purposes of this argument, Respondent will assume that it does. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

The standard used by the Fifth Circuit in *Reeves* is markedly different from the one utilized by the Tenth Circuit in this case. In this case, the Tenth Circuit found that Petitioner had arguably proved the *prima facie* elements of unlawful retaliation. Pet., App. A at 18a. In that respect, this case is similar to *Reeves*. However, Reeves was able to demonstrate that the explanation offered by the employer for its actions was not true. As the Tenth Circuit noted after reviewing the voluminous record in this case, Petitioner has utterly failed to provide any evidence that would discredit Respondent's contention that Petitioner did unacceptable work and refused to take direction from his supervisors. Pet., App. A at 22a-23a. Unlike Reeves, Petitioner did not provide any evidence, other than his own self-aggrandizing evaluation, that contradicted Respondent's reason for the termination.

The Tenth Circuit has never held that the proof of a *prima facie* case should not be considered in assessing whether a plaintiff has proved that the employer's justification for its actions are pretextual. To the contrary, as the Tenth Circuit noted in *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1397 (10th Cir. 1997):

> This is not to say that evidence introduced as part of the prima facie case cannot also be used at the pretext stage of the analysis. *See Burdine*, 450 U.S. at 255 n. 10, 101 S. Ct. at 1095 n. 10 ("[i]n saying that the presumption drops from the case [at the third stage], we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case.").

The Panel relied upon *Conner* in this case. Pet., App. A at 20a-21a.

In *Reeves*, this Court held:

> [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted evidence that no discrimination had occurred.

120 S. Ct. at 2109.

Petitioner did not satisfy his burden of proving pretext, and the record in this case is replete with uncontroverted evidence of Petitioner's poor performance and obstreperous attitude toward his supervisors.

After considering the relevant facts and the applicable law, the Tenth Circuit properly denied Petitioner's request for rehearing or en banc review. This is not, as Petitioner suggests, a decision that conflicts with this Court's decision in *Reeves*. Rather, the Court of Appeals decision fully

comports with the guidelines delineated by this Court. The facts presented by Petitioner were carefully analyzed under those guidelines, and the Court of Appeals reached the appropriate decision.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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